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No. 82-387

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

GERALD V. CONROD, JR.,

Petitioner,

vs.

JEEP CORPORATION; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, and AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW LOCAL 12; DOMINIC J. MATTONI; BOOKER HARRIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. In an action brought by a union member for wrongful discharge, has the union fairly represented said member where?

(1) Union officials readily and traitorously conceded that the employer's charges of sabotage were valid despite immediate and repeated claims of innocence by said union members;

(2) Where union officials, though immediately and repeatedly requested to do so, failed to conduct an investigation regarding the validity of the allegations against the discharged employee, wherein there was readily available strong and conclusive evidence and witnesses to prove that the union member did no sabotage nor harm nor caused any loss to the employer,

and did not commit any dischargeable act; and;

(3) Where some decision making Union Officials had critized unjustly the white union member for criticizing some black workers for incompetency, and uncalled for physical threats, and by reason thereof some Union Officers had some hostility against the union member and;

(4) Where Union Officials did not timely notify the union member that they were dropping his grievance so as to enable said member to effectively and timely pursue further appeals to his union or to request continued prosecution of his grievance;

2. Is a prima facie 42 U.S.C. Sec. 1981 "reverse racial discrimination" case presented where international racial discrimination was claimed, but not pleaded, and there was

evidence sufficient to establish that certain black union members were given preferential treatment by black union and Company officials and where certain black employees were either not charged with any wrongdoing nor discharged for doing similar acts, or acts of even greater seriousness than those charged against petitioner.

3. In an action for wrongful discharge, and a claim of wrongful representation by the union defendants, should the District Court in passing upon the motions of the employer and union defendants for summary judgment, consider all evidence, appearing by deposition, and/or by affidavit, answers to interrogatories, and the contentions of law reasonably derived therefrom, as well as all legal contentions referred to in any Motion, Memorandum of Law,

Pre-Trial Brief, or other legal argument or filing, even though at the time the plaintiff has not pleaded the same?

4. Does the Circuit Court of Appeals on an appeal to that Court from adverse judgment in the District Court granting a motion for summary judgment, have the jurisdiction, and the duty, to consider and rule upon a motion to amend the pleadings, to conform to the evidence adduced below in the proceedings below in the motion for summary judgment, and so as to give the party moved against, all the relief to which his actual evidence entitles him, under Rule 54(C) and Rule 15(B)?

5. After a District Court has granted a motion for summary judgment, and the losing party promptly and immediately files a motion for reconsideration, urging by additional

affidavits, sufficient evidence, to demonstrate that, if so considered, that the motion for summary judgment should not be granted, is the trial court under a duty so to consider the said offered additional evidence?

6. Do union and employer defendants in claiming a failure to exhaust intra-union appeals and remedies, bear the burden of proof in establishing that any alleged appeals to the member's union would provide the same, adequate relief as is available in an action in Court, and that such relief is available on grounds no more restrictive, and in a timely fashion within the statutory time limit?

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CERTIFICATE AND PROOF OF SERVICE

Three copies of this Petition For A Writ Of Certiorari was mailed to each of the following counsel for defendants:

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OPINIONS BELOW

None of the decisions below have been reported.

The United States Court of Appeals for the Sixth Circuit rendered an opinion and Order in this case on May 25, 1982, denying Petitioners Petition for Rehearing, reprinted herein as Appendix A, Pg. 1a. The Sixth Circuit Court of Appeals had issued its Order and Opinion, which is reprinted herein as Appendix B, Pg. 6a, on March 4, 1982, affirming the orders and judgment of the District Court for the Northern District of Ohio, Western Division, which on October 15, 1979, had issued its Opinions and Order, which is reprinted herein as Appendix C, Pg. 14a, granting judgment for the defendants on their Motions for summary judgment, which is reprinted herein as Appendix D, Pg. 31a; and likewise the Court of Appeals affirmed the Order of the District Court of October 31,1980,

denying plaintiff's motion under Rule 59 to vacate and other relief, which Order is reprinted herein as Appendix E, Pg.33a.

STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the United States Court of Appeals for the Sixth District was entered on March 4, 1982. The jurisdiction of this Court is properly invoked under 28 U.S.C. Sec. 1254(1) since the Petitioner is seeking review by the Court of a decision in the United States Court of Appeals for the Sixth Circuit, which on May 25, 1982, issued its order denying this Petitioner's Petition for rehearing.

Petitioner, on August 23, 1982, then within ninety (90) days from May 25, 1982, applied for a ten-day extension to file his Petition for a Writ of Certiorari, and this Court on August 23, 1982, granted an extension to and including September 2,1982, within which to file his Petition for a Writ of Certiorari.

STATUTES INVOLVED

29 U.S.C. Sec. 185 provides:

"Suits by and against labor organizations

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations

(1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of Process

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

42 U.S.C. Sec. 1981 provides:

"Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

STATEMENT OF THE CASE

Petitioner Gerald V. Conrod (hereinafter "Conrod") was hired by the Jeep Corporation on August 29, 1974, to work as a spray painter. Conrod then became a member of the International Union, United Automobile, Aerospace, Agricultural, and Implement Workers of America, UAW, Local 12 (hereinafter collectively "Union"). Conrod remained a union member during his discharge and subsequent grievance appeal.

As a spray painter, Conrod worked in a spray paint booth with several other such painters. The painting operation was relatively simple: chassis and frames that ran through the booth along an assembly line were painted by said painters via the use of pressurized spray painting guns.

On October 10, 1975,-after painting a chassis pursuant to his regular course of duties - Conrod, with a free moment and in a playful test of strength, and as his fore-

man and other workers had done without criticism, successfully lifted the newly painted chassis from the assembly line carrier. Such an act was not an uncommon occurrence at the plant; other employees were known to likewise engage in such a test of strength. In fact, there were never any instructions by Jeep that employees should not engage in such activities.

In lowering said chassis, Conrod inadvertently neglected to lower it into its proper groove. Upon noticing that the chassis was out of line, Conrod - of his own volition - acted to remedy the problem. While Conrod was so doing, his foreman, Ken Haggerman (hereafter "Haggerman") observed this and warned Conrod to refrain from such activity in the future.

Subsequent to this reprimand and pursuant to the customary and usual plant procedure and practice, Conrod then proceeded to "bleed" his spray gun. This procedure, in the circumstances then facing Conrod, is performed

by spraying the paint against the wall, because had the gun been "bled" or discharged toward the floor, or "pit", the paint particles might have gotten on the next chassis on the assembly line. Conrod followed this particular practice so as to avoid getting paint on the next chassis.

In the course of this procedure, some of the discharged paint dripped onto the outside of, but not into, a container of paint thinner near the wall. Both the wall and the thinner container were protected by a rubberized, "peel off," and expendible, protectant which was regularly sprayed by Jeep maintenance for such purpose, and periodically removed and replaced. Therefore, because of this protectant, no damage whatsoever resulted to either the wall nor the paint thinner, nor to any other Jeep property.

Thereafter, Haggerman immediately advised Conrod that he was being terminated and accused of sabotage. It should be noted that Conrod neither intended to, nor did Conrod in fact, cause any damage whatsoever as a result of lifting the chassis or from the discharge of the paint. Furthermore, other employees, to the defendants' knowledge, had similarly lifted jeeps and similarly the spray guns against the wall - the same acts as Conrod was accused - but were not fired nor disciplined.

Since Jeep admitted that the only claimed damage to Jeep was from Conrod's acts which allegedly contaminated the container of the paint thinner, the essential factual inquiry is thus posed: Did Conrod on October 10, 1975, do anything which caused any loss, damage, or harm to Jeep's property, or cause any disadvantage or delay to the assembly line? Petitioner

Conrod, from the moment he was fired, immediately denied all such accusations and allegations, asked his Union Steward and Committeeman, and Union and Management representatives, to come to inspect the thinner container, and the assembly line, but both Union and Management failed to check the container and the assembly line, and failed to talk with Conrod's witnesses, his fellow workers. Had they done so, both Union and Jeep representatives would have seen that both Conrod, and his replacement, used the same paint gun, changed satisfactorily to the new colored paint, for the next chassis, and the assembly line continued without delay nor loss, and that nothing had in any way contaminated the container of paint thinner, and Jeep continued to use this same container of paint thinner, in the same condition in which Conrod left it, without any loss or damage, and without it offering any

problem whatsoever. In fact, the Union Steward, and Committeeman, and Conrod's Foreman Hagerman, and Jeep's Paint Room Superintendent, Mr. Roush, a black, all knew that there had been no damage nor loss, but used this as a false front to fire Conrod, whose independence, and conscientious and justified comments of criticism of some of the black fellow workers for incompetency, inefficiency, and uncalled for threats of force, had caused some of the power wielding office holders of his Union to be hostile to Conrod, who in effect had charged his Union and Jeep, as was true, with racial discrimination by Union and Jeep in favor of blacks over whites.

Since the Court's below prejudicially erred in finding Conrod, in effect, chargeable with doing damage to Jeep, this counsel believes it helpful and time-saving

to the Court to here go further in demonstrating the absence in truth of any damage, sabotage or grounds for discharge. First of all, the only damaged claimed by Jeep is given in Jeep's Answer to Plaintiff's Interrogatory 25 as follows:

> "INTERROGATORY NO. 25: What actual damage, if any, did plaintiff allegedly do on or about October 10, 1975, in the incident for which Jeep discharged him? Please state specifically and in detail.
> ANSWER: On October 10, 1975, the plaintiff was observed contaminating a container of thinner by spraying paint into it making it useless. The container of thinner is designed so the head of the spray gun, while not in use, can be immersed in the thinner preventing paint from clogging in the head of the gun."

Since the paint booth during painting operations was continuously filled with paint spray, it's obvious that the thinner container had to be made with some kind of a sealing device which kept out the spray. It was. Likewise, droplets, and drips of paint, and paint spray, during regular painting operations, collected continuously on the top of the thinner container, as

happened here, but this did no damage because it did not get inside. If it had gotten inside, the painters, like Conrod, and his replacement, would have had their different paints mixed in some fashion, but that simply did not occur. Obviously this is a highly crucial and significant demonstrative point, which any employer and union representative, acting in good faith, would have checked, but neither Jeep nor the Union checked the same, although Conrod requested the same, and although Conrod and his fellow workers knew there had been no contamination, and Conrod's witnesses and fellow workers, have, and would so have, sworn and testified, but the Union, though requested, in bad faith refused to check with them.

In short the walls of the paint booth where Conrod worked, and the thinner container and other Jeep property in the paint booth,

were not substantially changed in condition, and were not damaged by any of Conrod's acts or omissions. The painting operations went on without any changes in the paint gun or thinner container. The charge of sabotage was simply not valid, but was actually a false front knowingly used by Jeep and the Union to get rid of a deserving, proud, and independent good worker and union member who "told it like it is," and thus unfortunately - Conrod has been effectively cut off from factory work - deprived of his job and livelihood.

A grievance was filed for Conrod, but the union in an obviously perfunctory fashion, just went through the motions, and did not inform Conrod of the arguments used by Jeep, and the union responses thereto. Also, the union concealed from Conrod the fact that Conrod's grievance was dropped by the union, after the third step. Conrod continuously called to his Union representative,

Defendant Mattoni, who always said the grievance was going along. Defendant Mattoni showed his hostility and bad faith by knowingly and falsely concealing that the grievance was dropped November 5, 1975. In the next spring, Conrod, broke, went to the Toledo Legal Aid Society, and after a lawyer there wrote to Jeep and the union, the lawyer and Conrod first learned in May, 1976 that the union had dropped Conrod's grievance on November 5, 1975. This, in itself, reflected the union's bad faith, "don't care," policy, and prevented Conrod from being able to appeal to his union within thirty (30) days of the adverse union action. When Conrod later tried an appeal to his Local, the Local denied the appeal because it was not filed within thirty (30) days of November 5, 1975.

Union hostility and bad faith was further evidenced when Conrod, went back at

the union headquarters, about a week or so after his discharge, was asked by the top union man, Mr. Davis, a black, if Conrod had told Defendant Committeeman Harris, a black, that Conrod would not have been fired if Conrod had been black, or if fired, that the union would have gotten his job back. Conrod said yes. Mr. Davis, the top union man, didn't even ask Conrod for Conrod's reasons of why Conrod claimed innocence of sabotage. A top union man interested in good faith would have discussed the Pro's and Con's of Conrod's case. Instead, the union, from the day of the discharge, traitorously and disloyally conceded Jeep was entitled to discharge Conrod. Conrod always admitted he had lifted the carrier, and "bled" the paint gun, and always pointed out that the Foreman and others had done the same thing, including "bleeding the paint gun" by other workers, and

that no damage or harm was done, that Jeep had issued no instructions against lifting the carrier nor "bleeding the paint gun" against the wall, and that others had commonly done the same thing but were not fired. Conrod also had pointed out that some blacks had done more serious offenses, but either weren't fired, or the union got their jobs back, but the union simply refused to make these basic and fundamental arguments though requested so to do.

The District Court refused Conrod's Motion to require Answers to Interrogatories asking the union to state the five (5) closest prior cases, or precedents of employees fired or disciplined, both favoring or and opposing Conrod's contentions.

By affidavit, and deposition, Conrod clearly raised different valid defenses to Defendants' Motions for Summary Judgment, including Racial Discrimination under

Section 1981, and other legal grounds, which were not pleaded, but raised by clear reference to the same in the Pre-Trial Brief, which was timely filed on October 12, 1979, although the trial court stated otherwise, and by reference to other filings in the District Court.

After the District Court granted Defendants' Motions for Summary Judgment, plaintiff within fourteen (14) days under Rule 59 filed his Motion to Vacate or Amend the Summary Judgment; and also to require defendants to answer certain Interrogatories, partly directed toward whether the Infra-Union Appeal was in fact illusory, and if it could re-open the grievance procedure, and partly toward requiring the union to state what actual damage Conrod had actually done.

This counsel, having observed at Pre-Trial Conference in other cases,

that the particular District Judge had not imposed any penalties toward attorneys not filing a trial brief, and thinking also that since this case was set for Pre-Trial, that the court would not take any action on the Motions for Summary Judgment, this counsel timely filed his Pre-Trial Brief, which substantially and forcefully argued a Prima Facie case, thinking it would suffice until the Pre-Trial, at which time the court would allow further discovery, any amendments, needed, and take other action toward seeing that the case would be determined on its merits. But instead, the District Court refused to consider the trial brief, and granted summary judgment. Conrod then filed his Motion under Rule 59, within the time limit, and tendered additional relevant and supportive affidavits, one

of which from Wampler, had not been previously available.

Notices of Appeal to the Sixth Circuit were timely filed after each order of the Trial Court, the first Notice on November 14, 1979, and the second Notice on December 1, 1980.

REASONS FOR GRANTING THE WRIT

I. THIS COURT, WHILE ANNOUNCING THE DUTY OF THE UNION TO ACT IN GOOD FAITH, IN A NON-PERFUNCTORY MANNER, FREE FROM HOSTILITY OR FRAUD, HAS NOT DEVELOPED THE MINIMUM REQUIREMENTS OF FAIR REPRESENTATION AS TO THE BASIC DUTIES OF INVESTIGATION AND FOLLOWING UP LEADS. THE FEDERAL AND STATE COURTS NEED THE DIRECTION WHICH A DECISION ON THIS CASE WILL AFFORD.

This counsel states that from his research, which now includes many hours, he has not found one decision from this Court dealing with the union's duties to investigate. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, dealt with a case where the union had failed to check out the requests of the discharged truck drivers for the union to see certain witnesses. But the issue of whether the union was guilty of unfair representation was not before the Court.

In the instant case, Conrod, while admitting he lifted the carrier, and "bled" his paint gun against the wall, repeatedly claimed his innocence of sabotage, and damage to property, and asked both union and

company to investigate the alleged damaged Jeep property and to inspect it, and to talk to his replacement and fellow worker witnesses, because even after Conrod had "bled" his paint gun, both Conrod and his replacement painted several jeeps without any problems. But the Union and Jeep refused.

The instant Conrod case also presents an opportunity for judicial declaration of what constitues union hostility, reverse racial discrimination, and disparate treatment, as Jeep had never fired anyone for mere damage to property, as was demonstrated by Jeep's Answers to Interrogatories.

The duties of the union in investigating the relevant facts and arguments has been discussed in various federal cases; Thompson v. International Association of

Machinists, 285 F.Supp. 235 (U.S.D.C., E.D.Va. 1966, at page 238; Bazarte v. United Transportation Union, 305 F. Supp. 443, 444 (U.S.D.C., Penn. E.D. 1969); See Ruzicka v. General Motors Corp., 523 F.2d 306 (CA6, 1975), which some commentators say establishes negligence as unfair representation; Baldini v. Local U. No. 1095, International Union, 581 F.2d 145, 151 (CA 7, 1978).

Both the discharged employee and the union will benefit from the direction this case can afford. The duty fairly to investigate is crucial to the American tradition.

II. PETITIONER'S EVIDENCE ESTABLISHED A PRIMA FACIE CASE OF REVERSE RACIAL DISCRIMINATION. THE FEDERAL COURTS, AND INDEED THE STATE COURTS ALSO, NEED DIRECTION FROM THIS COURT AS TO THE BASIC REQUIREMENTS FOR AN EMPLOYEE DISCHARGE CASE AS TO WHAT CONSTITUTES REVERSE RACIAL DISCRIMINATION, AND THE DUTY OF THE TRIAL COURT TO CONSIDER THE SAME, EVEN THOUGH NOT PLEADED, OR IN THE ALTERNATIVE, TO GRANT LEAVE TO FILE AN AMENDED PLEADING.

The evidence illustrates that both the union and Jeep rendered preferential treatment toward blacks in general and racially discriminated against Conrod in particular. There were instances where blacks committed more serious offenses than those with which Conrod was charged but were not disciplined in any way.

The most notable instance occurred where Conrod witnessed a black coworker maliciously and purposely banging a jeep with a hammer - in the presence of his foreman - and this individual was not reprimanded. In addition, Conrod had critized a black with whom he was working who was not adequately performing his

job. When Conrod complained that this individual was hindering assembly line operations, both Jeep management and the union officials sided with the black employee and were openly hostile toward Conrod. Racial discrimination, in the last two lines of the quote from Conrod's affidavit - filed before Summary Judgment.

The intricacies of labor law, racial disrimination, and what does evidence the same, are no more today known to the lawyers available to the discharged employee, than were known by this counsel then.

Yes, our great Country, and its great Bench and Bar, do need the help from this great Court in furthering our best judicial traditions, in this area of the law.

In the instant case, the Sixth Circuit at first thought that an employee could not

assert reverse racial discrimination under Title 42, Section 1981, and dismissed that part of the claim because no Title 42, "Section 7" charge had been filed before the Equal Employment Opportunity Commission. Only on Petition for Rehearing did it consider McDonald v. Santa Fe Transportation Company, 427 U.S. 273, (1976) but then the Sixth Circuit refused to apply it.

This counsel had given Jeep and the union notice of the claim at Conrod's deposition. Conrod himself, not a lawyer, in fact knew it, but didn't realize the legal implications. His deposition, at its page 87, reads in part:

> "Q. You're not contending in this case that you were discharged for any racial reasons, are you?
> A. Not just for that, no. No, not - - no, not for - - no.
>
> MR. RUST: I can say for the record, we're going to contend everything, so that you can be informed and depose him."

This counsel timely filed his Pre-Trial Brief on October 12, 1979, a date specified

as proper in the Pre-Trial Notice from the District Court. At page 19 of Plaintiff Conrod's said Pre-Trial Brief, filed before the District Court granted Summary Judgment, the Brief at page 19 thereof reads in part as follows:

> "There are many, many contraverted issues of significant fact, and the same allow the inference of improper motive, bias or malice.
>
> Likewise, as Plaintiff stated in his heretofore filed Affidavit in Paragraph 11, which reads:
>
> '11. I claim that the Union and its representatives were company dominated, and that they worked in cohorts with the foreman and management against me, and denied me my rights; and that when the details are unfolded, through the Interrogatories and other investigative procedures, that this will become evident to the Court and Jury. I believe that if I had been black that Jeep would not have sought to fire me and the Union would have kept my job for me. This is based upon prior observations.'"
>
> This shows a claim of reverse discrimination.

III. THE FEDERAL AND STATE COURTS NEED DIRECTION FROM THIS COURT THAT A PARTY OFFERING

EVIDENCE BY AFFIDAVIT, DEPOSITION, OR OTHERWISE, SHOULD BE ENTITLED TO HAVE HIS PLEADING DEEMED AMENDED TO ACCOMODATE ALL LEGAL CLAIMS AND DEFENSES RAISED BY THE EVIDENCE ADDUCED SO AS TO EFFECTIVELY OPPOSE A MOTION FOR SUMMARY JUDGMENT, AND THE COURT, IF NEED BE, SHOULD GRANT LEAVE SO TO AMEND, BEFORE RULING ON THE MOTION.

Rule 15(b) of the Federal Rules of Civil Procedure provides, in part: "when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

In the case at bar, evidence was raised that suggested that, if considered by the Court, there were factual issues in dispute so as to successfully oppose the defendant's respective Motions for summary judgment.

In Johnson v. Mateer, 625 f.2d 240 (CA 9, 1980), after the defendant moved for summary judgment, the plaintiff responded with additional affidavits with new allegations made therein. The Ninth Circuit held that, even though no request was made in

any court to amend, the plaintiff's complaint nevertheless was deemed to be amended. Id at 242.

Another case wherein a theory of legal liability was successfully advanced for the first time in a memorandum filed in opposition to a motion for summary judgment is Sherman v. Hallauer 455 F 2d 1236 (CA5, 1972). See, also, Freeman v. Marine Midland Bank-New York 494 F 2d 1334(CA 2, 1973).

The history of the actions of the attorneys here is common, and many citizens will lose deserved claims and defenses, unless the Rules are so interpreted and applied. For the Courts to do justice is to enhance our great traditions.

IV. ON AN APPEAL TO THE CIRCUIT COURT OF APPEALS, FROM AN ADVERSE JUDGMENT IN THE DISTRICT COURT GRANTING A MOTION FOR SUMMARY JUDGMENT, THE COURT OF APPEALS HAS BOTH THE RIGHT AND DUTY TO CONSIDER AND RULE UPON A MOTION TO AMEND THE PLEADINGS TO CONFORM TO THE EVIDENCE ADDUCED BELOW.

Since the Federal Rules of Civil Procedure are directed to the District Courts, there is then no express rule decisive in the Court of Appeals dealing with the issue. However, under the general powers invested in the Court of Appeals, that court has the power, jurisdiction, and the duty to hear, consider, and ultimately grant said Motion.

According to 3 Moore's Federal Practice at page 15-168, "an amendment to conform to the evidence may be made at anytime or Motion by any party, even in the Appellate Court..." (Emphasis added). 3 Moore's Federal Practice ¶ 15.13(2), (1974).

In Dunn v. Transworld Airlines, Inc., 589 F 2d 408 (CA 9, 1978), the Ninth Circuit

noted that "[u]nder Rule 15(b)...an amendment may be made at any time on the motion of any party, even at the appellate level." Id at 412.

In Lamb v. Sutton 274 F 2d 705 (CA 6, 1966), the defendants in the slander action claimed that they were immune from prosecution under the Federal Communications Act of 1934. However, said defendants failed to specifically plead or name the applicable statue. The Sixth Circuit, pursuant to Federal Rule of Civil Procedure 15(b), treated the defense as if it were properly raised. See also, Hasselbrink v. Speelman 246 F.2d 34 (CA6 1957), Underwriter's Salvage Co. of N.Y. v. Davis and Shaw Furniture Co. 198 F.2d 450 (CA 10 1952); Katz Drug Co. v. Katz 89 F. Supp. 528; and Purofied Down Products Corp. v. Corp. v. Travelers Fire Ins., Co. 278 F2d 439 (CA 2, 1960).

Therefore, based upon the foregoing, the Sixth Circuit Court of Appeals should have considered the subsequent evidence proffered by Conrod, as a matter of right pursuant to Federal Rule of Civil Procedure 15(b).

V. THIS COURT SHOULD DECLARE THE NEEDED PRINCIPLE THAT THE EMPLOYER AND UNION EACH HAD THE BURDEN OF PROOF IN ESTABLISHING THE AFFIRMATIVE DEFENSE OF THE EMPLOYEE'S ALLEGED FAILURE TO EXHAUST HIS INTRA-UNION REMEDIES, BY SHOWING THE UNION APPEAL GAVE RELIEF AS BROAD AS A SECTION 301 ACTION, IN A TIMELY FASHION.

In Clayton v. International Union, etc., 451 U.S. 679 (1981), the Supreme Court held that since petitioner Clayton could not have obtained adequate relief through intra-union appeals, then the requirement of the exhaustion of such internal union appeals as required by Hines v. Anchor Motor Freight, Inc., 424 U.S.554(1979) was not a bar to Clayton bringing suit under Section 301 of the Fair Labor Management Act 29 U.S.C. Sec. 185.

In rendering its decision, the court did not address the issue of which party bears

the burden of proof regarding the failure to exhaust intra-union remedies because the record was adequate and, therefore, the issue was not raised.

In the case at bar, the union should bear the ultimate burden of proof because, in addition to being the moving party, the union has better access to information and has a closer relationship to the international union than does the petitioner. In addition, the union defendants and Jeep should bear the risk of persuasion because they are the moving parties who raised the issue. See, generally, Volume 6, Moore's Federal Practice, p. 56-466.

In Johnson v. General Motors Corp., International Union, U.A.W., etc. 641 F.2d 1075 (CA 2, 1981) the court placed the burden of proof on the union. In rendering its decision, the Second Circuit noted that the

union is in a better position than the employee to address the court regarding the adequacy of the Intra-union remedies available. Id at 1079. See, also, Orphan v. Furnco Construction Corp. 466 F.2d 795, 861-02 (CA 7, 1972); Dorn v. Meyers Parkway System 395 F. Supp. 779, 785-86 (E.D. Pa 1975); and Cammarata v. Ice Cream Drivers and Employees Union, etc., 441 F.Supp. 696 (E.D.N.Y.1977), aff'd mem. 591 F 2d 1329 (CA 2, 1978).

Because the Supreme Court has not directly addressed the issue, of burden of proof, regarding the exhaustion of intra-union appeals, the court should review this case in order to implement the decision of Clayton, Supra.

VI. THIS COURT SHOULD DECLARE THE DUTY ON ANY TRIAL OR REVIEWING COURT TO CONSIDER ANY AND ALL EVIDENTIARY FILINGS, INCLUDING AFFIDAVITS, WHICH ARE FILED WITHIN THE TIME LIMIT FOR A MOTION UNDER RULE 59, IN PASSING ON A MOTION FOR SUMMARY JUDGMENT.

In this case, Conrod attached to his Rule 59 Motion, timely filed after the court had granted summary judgment, three affidavits, one from fellow worker and witness Wampler, which added some new evidentiary points, and corroborated the disparate treatment which Conrod was given. Also, the motion stated on page 2 thereof:

> "3. Blacks had committed more serious wrongs, even involving damage to Jeep's property, with knowledge of Jeep and the Union, but were not fired;"

and at page 3:

> "4. Union Leaders Booker Harris, George Davis, and others concentrated their interest in discussing Plaintiff's

remark to Booker Harris that if Plaintiff had been black, Jeep would never have fired Plaintiff, and at any rate, the Union would have saved his job, and would have prevented him from being subjected to all that harassment;

5. The Union was sore and biased against Plaintiff, partly because previously he had complained about black workers who weren't doing their jobs, and the Union had threatened Plaintiff with charges of harassing black workers if he had persisted;"

Also, Plaintiff's Rule 59 Motion asked for the Court to order Jeep and the Union Defendants to answer relevant interrogatories as to the scope of relief available through intra-union appeals, the length of time involved, and whether the grievance could

thereby be re-opened.

That relevant additional evidentiary filings, such as affidavits, depositions, should be considered by the District Court in determining a motion for Summary Judgment, though filed with a Rule 59 Motion after an original adverse Summary Judgment, was held in Chapman and Dewey Lumber Co., v. United States, 359 F.2d 495, (CA 6, 1966) where the opinion at page 498 reads as follows:

"After the motion for judgment was allowed, counsel for the appellant moved for a new trial and supported the motion with four affidavits. These affidavits do present issues of material facts.

We believe under the circumstances of this case, counsel having been induced to waive his argument on the motion for judgment, and in fairness to the taxpayer, there should be a plenary hearing on the issues raised by the affidavits.

Accordingly the judgment is vacated and the case is remanded to the District Court with instructions to conduct a trial solely on the issue of whether any of the items which make up the claim for refund are properly chargeable to deductible expense."

CONCLUSION

When an employee has been discharged, he or she usually is without funds to pay an attorney on an hourly basis. The factory discharge for alleged cause is for the employee the equivalent of "Capital Punishment" - a real bar to future employment. Hard working, able, and concerned counsel, in the past, and today, simply are not, and in the future will not, be available to meet and timely master all deadlines and the intricacies of law and factual patterns involved in getting justice for the discharged employee.

This counsel, relatively inexperienced in this field at the start and early stages of this case, has worked hard, and yes, in a scholarly fashion, assembled for the Court of Appeals, and to a lesser extent, for the District Court, highly relevant precedents. Misunderstanding of the facts and law, has beset Mr. Conrod and his counsel.

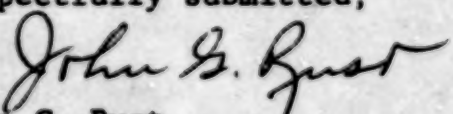
Our cause is just.

The relief herein prayed for is needed - yes, by Mr. Conrod and his counsel, and also importantly, by other discharged employees, and their counsel, and by the Bench and Bar.

Mr. Conrod and his counsel proudly and respectfully pray that our Petition be granted.

WHEREFORE, petitioner requests that this Court issue its Writ of Certiorari to the United States Court of Appeals, Sixth Circuit, and review the questions contained in the Questions Presented For Review, appearing at page (i) herein.

Respectfully submitted,



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Dated: September 2, 1982